MOTION FILED
DEC 28 1992

(4)

No. 92-906

In The

Supreme Court of the United States

October Term, 1992

BONNIE MOORE, ACCOUNTING CENTER, and CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,

Petitioners,

vs.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,

Respondent.

Petition For A Writ Of Certiorari To The California Supreme Court

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

and

BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED

1. Where a state occupational licensing board is statutorily controlled by a specific type of practitioner, may it lawfully deprive its competitors of the right to use terms which accurately describe the occupational services rendered, under threat of civil penalties, fines, and criminal prosecution?

2. What are the implications of this question *vis-a-vis*:

(a) due process rights to a fair and impartial tribunal for both rulemaking and adjudication; and

(b) the requirement of "*independent* state supervision" required for "state action exemption" from federal Sherman Act antitrust scrutiny?

APPLICANT

Applicant Center for Public Interest Law ("CPIL" or "Center") respectfully requests this Honorable Court's permission to file an *amicus curiae* brief in support of the petition for certiorari filed by Bonnie Moore, Accounting Center, and California Association of Independent Accountants ("Petitioners") in the above-encaptioned case.

CPIL is a nonprofit academic and research center at the University of San Diego School of Law. Since 1980, CPIL has represented the interests of the unorganized

and underrepresented in state regulatory proceedings, and operated an academic center of research, learning, and advocacy in administrative and public interest law. The Center's primary goals are to ensure that state occupational licensing agencies regulate in the *public* interest (rather than in the interest of the trade or profession regulated), and to make the regulatory function of California state government more efficient, visible, and responsive by serving as a public monitor of state regulatory agencies. For twelve years, CPIL has published the *California Regulatory Law Reporter,* a quarterly legal journal summarizing and analyzing the activities of over sixty California regulatory agencies, including the State Board of Accountancy (Respondent herein). CPIL professional staff members specialize in regulatory, constitutional, and antitrust law.

At the request of Petitioners and their counsel, CPIL has actively participated as an *amicus curiae* in this proceeding for over three years. In California's First District Court of Appeal, CPIL filed an *amicus curiae* brief in support of Petitioners on November 10, 1989, and a reply brief on February 8, 1990. In the California Supreme Court, CPIL filed an *amicus curiae* brief on January 11, 1991, and a letter brief in support of Petitioners' motion for rehearing on July 17, 1992. Both the First District Court of Appeal and the California Supreme Court permitted CPIL to appear as an *amicus* in this case, over the repeated objections of Respondent and its counsel.

APPLICANT'S INTEREST

Petitioners represent one faction within the accountancy profession – those who lawfully perform accountancy functions and tasks which do not require a certified public accountant's (CPA) license. Respondent is the State Board, which licenses only CPAs and is controlled by currently practicing CPAs by statutory requirement. Applicant Center for Public Interest Law represents a significant absent interest: consumers who will be affected by the outcome. No individual or organization has appeared as an intervenor or *amicus curiae* on behalf of the CPA profession in this case; the profession needs no additional representation given its control of the state agency party before this Honorable Court. Without CPIL participation, the interests most affected by the outcome in this case – those of government in the public interest and those of the consumers of accountancy services – are completely unrepresented. And, in terms of the due process and antitrust implications of the issues here in dispute, neither party may assuredly raise issues or arguments of interest to the Court which do not coincide with the economic and legal interests of accountants.

CPIL recognizes that this Court's rules provide that the filing of an *amicus* brief at the petition stage when all parties have not consented is "not favored," Rule 37.2. However, CPIL has made a substantial contribution to this case for over three years, and its argument was adopted by the senior justice of the California Supreme Court in a dissenting opinion. (See dissent of Mosk, J., in Appendix to Petition for Writ of Certiorari, at 29-32.) Petitioners, who have focused on the commercial speech and separation of powers issues, have not addressed

CPIL's due process and antitrust issues in the state courts, and will not fully address them in this Court. Further, even if so disposed, Petitioners lack the expertise and perspective of this Applicant in this area. Respondent will not address these issues, fears their illumination, and has refused to consent to CPIL's filing of an *amicus* brief (*see infra*). Yet these issues are critical to this Court's understanding and resolution of the California courts' errors in approaching and purporting to resolve this important constitutional and federal antitrust matter.

IDENTITY OF PARTY WHO REFUSED CONSENT

On November 16, 1992, Applicant CPIL requested permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari from counsel for Respondent Board of Accountancy, Wilbert E. Bennett. By letter of December 14, 1992, Mr. Bennett refused consent.

Through their counsel Ralph C. Alldredge, Petitioners have consented to the filing of the instant *amicus curiae* brief.

For each of the reasons stated herein, Applicant Center for Public Interest Law respectfully urges this Court to grant its motion to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari.

Dated: December 24, 1992.

ROBERT C. FELLMETH
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Counsel for Applicant
Center for Public Interest Law

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

I. RESPONDENT'S COMPOSITION CONSTITUTIONALLY DISQUALIFIES IT FROM ADOPTING AND ENFORCING RULE 2 7

II. THE BOARD'S ACTION FAILS TO SATISFY THE "INDEPENDENT STATE SUPERVISION" REQUIREMENT TO WARRANT STATE ACTION IMMUNITY FROM FEDERAL ANTITRUST SCRUTINY 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Federal Cases

Associated Press v. United States, 326 U.S. 1 (1945) 16

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 17, 18

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 7, 9, 13, 15

Equal Employment Opportunity Comm'n v. Wyoming, *et al.*, 460 U.S. 226 (1982)..... 9

Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447 (1986)..... 16

Federal Trade Comm'n v. Ticor Title Insurance Co., ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) 17

Gibson v. Berryhill, 411 U.S. 564 (1973) .. 11, 12, 13, 15

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 11

In re Murchison, 349 U.S. 133 (1955)..... 11

McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) 16

Northwest Wholesale Stationers v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) 16

Parker v. Brown, 317 U.S. 341 (1943)..... 16

Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) 9

Tumey v. Ohio, 273 U.S. 510 (1927) 12

United States v. Darby, 312 U.S. 100 (1941)..... 9

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Sherman Act, 15 U.S.C. § 1 15

STATE CASES

Allen v. California Board of Barber Examiners, 25 Cal. App. 3d 1014 (1972) 9

American Motors Sales Corp. v. New Motor Vehicle Board, 69 Cal. App. 3d 983 (1977)..... 13

Bayside Timber Co., Inc. v. Board of Supervisors of San Mateo County, 20 Cal. App. 3d 1 (1971) 9, 10, 13, 15

Chevrolet Motor Division v. New Motor Vehicle Board, 146 Cal. App. 3d 533 (1983) 13

Nissan Motor Corp. v. New Motor Vehicle Board, 153 Cal. App. 3d 109 (1984) 13

State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436 (1953) 9

University Ford Chrysler-Plymouth v. New Motor Vehicle Board, 179 Cal. App. 3d 796 (1986) 13

STATE STATUTES AND REGULATIONS

Calif. Bus. & Prof. Code § 125.9 14

Calif. Bus. & Prof. Code § 125.95 14

Calif. Bus. & Prof. Code § 5000 *et seq.* 3, 7

Calif. Bus. & Prof. Code § 5052..... 3, 4, 13

Calif. Bus. & Prof. Code § 5058.....3, 7

TABLE OF AUTHORITIES – Continued

Page

Calif. Code of Regulations, Title 16, Division 1, § 2 ..... *passim*

Calif. Code of Regulations, Title 16, Division 1, § 95.6 14

OTHER AUTHORITIES

California Society of Certified Public Accountants' Task Force on Certification Requirements, presented to California Board of Accountancy (Jan. 27-28, 1989) 4

INTEREST OF *AMICUS CURIAE*

As noted in the accompanying motion, the Center for Public Interest Law (CPIL) is a nonprofit academic and research center at the University of San Diego School of Law. The Center's primary goals are to ensure that state occupational licensing agencies regulate in the *public* interest (rather than in the interest of the trade or profession regulated), and to make the regulatory function of California state government more efficient, visible, and responsive by serving as a public monitor of state regulatory agencies. For twelve years, CPIL has published the *California Regulatory Law Reporter*, a quarterly legal journal summarizing and analyzing the activities of over sixty California regulatory agencies, including the State Board of Accountancy (Respondent herein). CPIL professional staff members specialize in regulatory, constitutional, and antitrust law.

In this matter, Petitioners represent one faction within the accountancy profession – those who lawfully perform accountancy functions and tasks which do not require a certified public accountant's (CPA) license. Respondent is the State Board, which licenses only CPAs and is controlled by currently practicing CPAs by statutory requirement. Applicant Center for Public Interest Law represents a significant absent interest: consumers who will be affected by the outcome. No individual or organization has appeared as an intervenor or *amicus curiae* on behalf of the CPA profession in this case; the profession needs no additional representation given its control of the state agency party before this Honorable Court. Without CPIL participation, the interests most

affected by the outcome in this case – those of government in the public interest and those of the consumers of accountancy services – are completely unrepresented. And, in terms of the due process and antitrust implications of the issues here in dispute, neither party may assuredly raise issues or arguments of interest to the Court which do not coincide with the economic and legal interests of accountants.

CPIL has actively participated as an *amicus curiae* in this proceeding for over three years. CPIL has made a substantial contribution to this case, and its argument was adopted by the senior justice of the California Supreme Court in a dissenting opinion. (See dissent of Mosk, J., in Appendix to Petition for Writ of Certiorari, at 29-32.) Petitioners, who have focused on the commercial speech and separation of powers issues, have not addressed CPIL's due process and antitrust issues in the state courts, and will not fully address them in this Court. Further, even if so disposed, Petitioners lack the expertise and perspective of this Applicant in this area. Respondent will not address these issues, fears their illumination, and has refused to consent to CPIL's filing of an *amicus* brief (*see supra*). Yet these issues are critical to this Court's understanding and resolution of the California courts' errors in approaching and purporting to resolve this important constitutional and federal antitrust matter.

SUMMARY OF ARGUMENT

The Center for Public Interest Law (CPIL or Center) appears herein as *amicus curiae* on behalf of Petitioners

Bonnie Moore, Accounting Center, and the California Association of Independent Accountants (CAIA) (hereinafter "Petitioners"), and urges this Honorable Court to grant their petition for writ of certiorari in the above-entitled case.

Although Respondent and its attorney seek to overly complicate this case, it is actually very simple. It presents the all-too-common scenario of a state occupational licensing board purporting to act in the public interest but controlled by members of the very profession regulated by that board, and attempting to impose advertising restrictions on direct competitors in order to capitalize on their consequent loss of business.

The Board of Accountancy licenses certified public accountants (CPAs) in California. It is comprised of eight Board licensees and four nonlicensee public members. In the Accountancy Act, California Business and Professions Code section 5000 *et seq.*, the legislature has specified that a very narrow slice of what is generally known as "accounting" (specifically, the preparation of a formal audit with an accompanying certified opinion of soundness) may be performed only by a CPA. Through section 5052,[1] the California legislature has for many years countenanced and authorized non-CPAs to engage in other aspects of accountancy, and thousands have so practiced from the advent of accountancy practice in the state.

In section 5058, the legislature has specified that only CPAs may use the term "certified public accountant" and

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[1] All statutory references are to the California Business and Professions Code, unless otherwise noted.

other enumerated accounting titles and abbreviations. On the three occasions the legislature has amended section 5058 in the past 45 years, it has never prohibited the use of the unmodified term "accountant" by non-CPA accountants engaged in accounting activities expressly permitted in section 5052.

In 1948, the Board of Accountancy adopted "Rule 2" (section 2, Division 1, Title 16, California Code of Regulations). That rule was adopted by a board consisting entirely of licensees prior to the effectuation of the modern Administrative Procedure Act providing for notice, hearing, and review of proposed regulations. Rule 2 bars non-CPA accountants engaged in lawful accounting activity under section 5052 from using the terms "accountant" or "accounting" to describe themselves or their services. However, the Board did not enforce Rule 2 until recent years – that is, until the fees for CPA services have soared, putting them out of the reach of the small business owner, the farmer, the sole practitioner, and the individual consumer who needs general accounting services but not the auditing expertise reserved to CPAs by the legislature.

In the courts below, CPIL demonstrated that less than 20% of CPA firms perform certified audit work as their main source of income,[2] and noted that California CPAs

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[2] California Society of Certified Public Accountants' Task Force on Certification Requirements, presented to State Board of Accountancy at Oxnard, California (Jan. 27-28, 1989), attached as Exhibit B to Applicant's *Amicus Curiae* Briefs filed in the First District Court of Appeal on November 10, 1989, and in the California Supreme Court on January 11, 1991.

directly compete with non-CPA accountants for at least 80% of the accounting business in the marketplace; both CPA licensees and non-CPA accountants seek to perform the identical services. As CPA fees have risen, and as the volume of accounting business diverted from CPAs to non-CPA accounting practitioners has ballooned, so has the CPA profession's desire to put unlicensed accountants out of business, or at least severely restrict their advertising ability. In particular, CPAs desire to prevent unlicensed accountants from advertising in telephone directories under the heading "Accountant." Rule 2 – adopted and enforced by a board controlled by CPAs – fulfills this desire. Very simply, that is the bottom line in this case.

Both the California court of appeal and the California Supreme Court agreed with Petitioners that the Board's absolute ban on the use of the terms "accountant" and "accounting" by non-CPA accountants is constitutionally defective; however, neither court invalidated Rule 2. Instead, the appellate court improperly rewrote the rule at issue to permit non-CPAs to use the subject terms if accompanied by a mandatory disclaimer specifying that the user is unlicensed, or that the services rendered do not require a license. The California Supreme Court affirmed by a 4-3 vote, and denied a motion for rehearing by an identical 4-3 vote.

The Center for Public Interest Law urges this Honorable Court to grant Petitioners' petition for writ of certiorari on the grounds argued by counsel for Petitioners; to wit:

1. Rule 2 unjustifiably infringes the first amendment commercial speech rights of non-CPA accountants in California.

2. The court of appeal and the California Supreme Court improperly attempted to rewrite both the regulation and the legislation at issue. The courts were asked to validate or invalidate Rule 2; instead, they usurped the role of regulatory agency and legislature by specifying the use of a term which is inconsistent with both the regulation and the statutory scheme at issue.

Additionally, CPIL urges this Honorable Court to recognize the following significant issues:

3. Where a rulemaking and adjudicatory body consists primarily of licensees belonging to a specific economic grouping (*e.g.*, one type of accountant) in competition with other similar practitioners, is it constitutional for those board members to use the power of the State to adopt and enforce rules of practice to their economic advantage against groups not represented in the relevant tribunal?

4. Where members of an entity collude to engage in a group boycott against competitors which affects interstate commerce, will such action be immunized from federal antitrust scrutiny where the state agency purportedly supervising the anticompetitive conduct is controlled by members of the profession benefiting from that conduct?

I. RESPONDENT'S COMPOSITION CONSTITUTIONALLY DISQUALIFIES IT FROM ADOPTING AND ENFORCING RULE 2

As noted above, Respondent Board of Accountancy is currently required to be composed of eight Board licensees and four other members (none of whom are non-CPA accountants) pursuant to Business and Professions Code section 5000. When the Board adopted Rule 2 in 1948, it consisted of five licensed accountants.

Rule 2 purports to clarify Business and Professions Code section 5058, which prohibits the use of modified titles likely to be confused with the terms "certified public accountant" and "public accountant." Rule 2 prohibits non-CPA accountants from using the unmodified terms "accountant," "auditor," "accounting," and "auditing," as well as "any other titles or designations which imply that the individual is engaged in the practice of public accountancy" as "likely to be confused with" the regulated titles. The adoption of this rule by a board dominated by persons with a pecuniary stake in the rulemaking decision, and which is adverse to the interests of unregulated competitors, violates the due process rights of non-CPA accountants who directly compete with CPAs for accountancy business in the marketplace.

This Honorable Court has consistently upheld the fundamental principle that members of a multi-member governmental entity may not abuse their agency rulemaking authority to promote their own pecuniary interests. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), this Court examined the Bituminous Coal Conservation Act of 1935, a federal statute which purported to regulate the mining

of coal by, *inter alia*, establishing a National Bituminous Coal Commission and 23 coal districts, each with a specified membership. Section 4, Part III(g), of the Act delegated "the power to fix maximum hours of labor to a part of the producers and the miners – namely, 'the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year' and 'more than one-half of the mine workers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or groups of districts." *Id.* at 310-11. Viewing the issue as one of unlawful delegation of legislative power, the Court stated:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311.[3]

Prior to its decision in the instant case, California adhered to the rule in *Carter*. In *Bayside Timber Company, Inc. v. Board of Supervisors of San Mateo County*, 20 Cal. App. 3d 1 (1971), the First District Court of Appeal struck down a regulatory scheme mandated by statute, wherein timber operators and loggers were permitted to collude in cartel-like fashion to adopt rules regulating logging in various state districts under the jurisdiction of the State Board of Forestry. The court held that the legislature's standardless delegation of authority to industry-controlled regional committees was "violative of the state and federal Constitutions . . . and otherwise denies due

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[3] Following this Court's invalidation of the labor and price-fixing provisions of the 1935 Act in *Carter*, Congress enacted the Bituminous Coal Act of 1937, which withstood a constitutional challenge in *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940). Although the *Carter* Court's construction of the reach of interstate commerce clause has been largely discarded, *see United States v. Darby*, 312 U.S. 100, 123 (1941); *see also Equal Employment Opportunity Commission v. Wyoming, et al.*, 460 U.S. 226, 247 (1982) (Stevens, J., concurring), its prohibition on delegation of legislative authority to an agency or group of individuals with a pecuniary interest in its subject matter retains vitality. *See, e.g., State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436 (1953) (California Supreme Court invalidates minimum price schedule for the dry cleaning industry adopted by board dominated by dry cleaners); *Allen v. California Board of Barber Examiners*, 25 Cal. App. 3d 1014 (1972) (appellate court invalidates minimum price schedules established by a board consisting of four barbers and one public member); and *Bayside Timber Co., Inc. v. Board of Supervisors of San Mateo County*, 20 Cal. App. 3d 1 (1971) (appellate court invalidates state Forest Practice Act permitting loggers and timber operators to collude in adopting rules regulating the logging industry).

process of law to the interested and affected public." *Bayside Timber*, 20 Cal. App. 3d at 14. Concluding that, under the statutory scheme, "the content of the rules under which private logging operations are conducted is decreed exclusively by persons pecuniarily interested in the timber industry, *i.e.*, timber owners and operators," *id.* at 10, the First District invalidated the statute, recognizing the "age-old principle of our law that no man should judge or otherwise officially preside over disputed matters in which he has a pecuniary interest." *Id.* at 14.

The *Bayside Timber* court found the presence of non-industry members on the Board of Forestry to be an ineffective safeguard against the heavy bias in favor of logging interests created by the statutory scheme. Additionally, the court found that the interest in protecting against *public* injury (that is, "public injury [which] must inevitably result from placing exclusive control of the logging industry in the hands of persons who may be expected to profit most from the gathering of logs at the lowest cost and without environmental safeguards") deserves the same if not greater level of protection as does the potential injury to "individual *private* rights resulting from the creation of unfairly constituted public boards." *Id.* at 14 (emphasis original).

This case is not solely concerned with rulemaking by a state agency controlled by those with an impermissible pecuniary interest in the proceedings; for the CPA-controlled Board of Accountancy has also attempted to enforce its rulemaking through its adjudicatory authority. Although dormant for many years, the Board's recent enforcement of Rule 2 has taken the form of "cease and

desist" letters to unlicensed practitioners, ordering them to refrain from using the terms "accountant," "accounting," or "accountancy" in their advertising, business cards, letterhead, or elsewhere to describe themselves or their work. The Board of Accountancy – which, like other occupational licensing/regulatory agencies, functions as investigator, prosecutor, and judge in adjudicatory proceedings – has aimed its prosecutorial threats at individual unlicensed practitioners such as Bonnie Moore who provide accounting services to small businesses and individuals. The "cease and desist" letter sent to Moore included the threat of criminal prosecution.

Like the issue of abuse of rulemaking authority by a conflicted regulatory board, the issue of improper enforcement by a biased agency is not one of first impression. It is well settled that a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). Due process requires a competent and impartial tribunal in administrative hearings. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court found that the Alabama Board of Optometry was an unfair tribunal for purposes of instituting adjudicatory proceedings against competitor licensed optometrists. The Board, which consisted exclusively of private-practice optometrists, instituted disciplinary actions against several licensed optometrists who were employed by business corporations. The respondent corporate optometrists filed a civil rights action in federal court in an attempt to enjoin the Board's disciplinary proceedings. The district court halted the Board's action on two grounds: (1) prejudgment (the Board had previously filed a complaint in state court

against these same corporate optometrist respondents, alleging unlawful practice of optometry and unprofessional conduct); and (2) pecuniary interest (the court found that the respondent corporate optometrists accounted for nearly half the practicing optometrists in Alabama; if the licenses of these optometrists were revoked, the private practitioner board members would personally benefit). *Id.* at 578.

In enjoining the Board's license revocation action, the Supreme Court held: "[a]rguably, the District Court was right on both scores, but we need reach, and we affirm, only on the latter ground of possible personal interest." *Id.* at 579. Citing the landmark cases of *Tumey v. Ohio*, 273 U.S. 510 (1927) (mayor-judge with personal pecuniary interest in outcome of liquor law violation cases ruled unfair tribunal for such cases), and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor-judge with only indirect pecuniary interest in convictions resulting in fines ruled unfair tribunal), the Court stated that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Further, the Supreme Court cited the district court's reasoning that "the inquiry was not whether the Board members were 'actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.' " *Gibson*, 411 U.S. at 571.[4]

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[4] Prior to the instant matter, the California courts applied the *Gibson* rule vigorously. In a series of cases, the courts held that the statutory composition of the New Motor Vehicle Board

The fairness principles illustrated in these cases are easily applied to the case at hand, in both the rulemaking and adjudication contexts. In *Carter* and *Bayside Timber*, the coal and timber industries, respectively, controlled the regulation of those very industries; in *Bayside Timber*, the rules adopted invariably favored the timber industry to the detriment of the general public and other interests ostensibly sought to be protected by the Forest Practice Act. In *Gibson*, an optometry board controlled by one segment of the profession targeted another segment of that profession for enforcement proceedings. These actions were properly invalidated on due process grounds.

Here, the Board of Accountancy in 1948 – comprised of five licensed accountants, *no* public members, and *no* non-CPA accountants lawfully rendering services under what is now Business and Professions Code section 5052 – conducted rulemaking proceedings and adopted a regulation with the force of law which prohibits another kind of accountant from using the term "accountant" or "accounting" to describe his/her services. The Board then

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(four car dealer members, five public members, and no manufacturer members) deprived manufacturers of their due process right to a fair and impartial tribunal and disqualified the Board from issuing adjudicatory decisions in disputes involving manufacturers. *See University Ford Chrysler-Plymouth v. New Motor Vehicle Board*, 179 Cal. App. 3d 796 (1986); *Nissan Motor Corp. v. New Motor Vehicle Board*, 153 Cal. App. 3d 109 (1984); *Chevrolet Motor Division v. New Motor Vehicle Board*, 146 Cal. App. 3d 533 (1983); *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

abused its enforcement powers by issuing cease and desist letters, threatening criminal prosecution, and filing a cross-complaint for injunctive relief in this action. It further has the statutory authority to levy citations and fines against licensees and *non*licensees who violate Board statutes or regulations.[5] As testified to at trial in this matter, Rule 2 and its enforcement have a detrimental impact on the ability of non-CPAs to advertise their services to those most in need of them through the usual means of advertising – the telephone directory under the heading "Accountant."

That the Board's Rule 2 harms Bonnie Moore and other non-CPA accountants, to the benefit of CPAs permitted to easily and accurately advertise those same services, is clear. But it also harms the general public, the small business, the farmer, the sole practitioner, the individual in need of the accounting services described in Business and Professions Code section 5052 but without the wherewithal (or need) to pay a CPA. While CPAs must be qualified to perform highly technical audits, the usual individual or small business has no need for those sophisticated skills (and clearly should not be required to

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[5] Sections 125.9 and 125.95 of the California Business and Professions Code permit the Board of Accountancy to establish by regulation a system for the issuance of citations and fines to licensees and nonlicensees who violate the Board's statutes or regulations. The Board of Accountancy adopted rules to implement this authority in February 1990; under section 95.6, Division 1, Title 16 of the California Code of Regulations, the Board's executive officer is permitted to issue citations containing orders of abatement and administrative fines up to $2,500 per investigation against unlicensed persons who are performing acts for which licensure is required.

pay for them, or for the substantial overhead costs incurred by licensed CPA firms). Unlicensed firms such as Petitioner Accounting Center are not permitted to and do not perform at that technical and complex level, yet they are restricted from truthfully reaching those most in need of their services. When consumers who require accounting services are prevented from locating an entire class of providers, it is they who suffer irreparable harm – not the Board-licensed CPAs who adopted Rule 2 and have threatened criminal prosecution to enforce it.

In restricting consumers' access to non-CPA accountants by forbidding these practitioners from advertising their lawful accounting services openly, accurately, and in the manner most frequently used in the normal course of business, the CPA-controlled Board has effectively limited CPAs' competition for non-audit clients. The industry-dominated Board has allowed its substantial pecuniary interest to outweigh the strong policy against anticompetitive agency rulemaking and enforcement illustrated in *Carter, Gibson*, and *Bayside Timber*. This conduct by the Board violates the due process rights of Petitioners and those who would employ them.

II. THE BOARD'S ACTION FAILS TO SATISFY THE "INDEPENDENT STATE SUPERVISION" REQUIREMENT TO WARRANT STATE ACTION IMMUNITY FROM FEDERAL ANTITRUST SCRUTINY

The federal Sherman Act, 15 U.S.C. section 1, prohibits combinations in restraint of trade. This federal statute is entitled to the full effect of the Supremacy

Clause, and applies to the anticompetitive conduct of states where it "affects" interstate commerce. The "affecting interstate commerce" criterion is broad and would clearly include a restriction applying to thousands of accountants in California, given their involvement in businesses engaged in interstate commerce. *See, e.g., McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980) (finding New Orleans real estate brokerage practices to "affect" interstate commerce due to an ancillary impact on interstate home financing and interstate title insurance charges).

An agreement by entrepreneurs to exclude those in horizontal competition is termed a "group boycott" or "concerted refusal to deal." Such behavior where horizontal in nature is often considered to be a *per se* violation of federal antitrust law. *Associated Press v. United States,* 326 U.S. 1 (1945). Recent decisions have qualified the *per se* rule to some extent, confining it to certain types of group boycotts and applying the "rule of reason" allowing consideration of a defense to others. The acts at issue here, if undertaken by a private trade association and without state sanction, would clearly constitute a group boycott, and probably of the *per se* type. *See Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.,* 472 U.S. 284 (1985); *see also Federal Trade Comm'n v. Indiana Federation of Dentists,* 476 U.S. 447 (1986).

The act of depriving one's competitors of the long-standing label used to identify their services by coercive means is here allowed only if it meets what has been termed "state action immunity." *See Parker v. Brown,* 317 U.S. 341 (1943). However, such "state action" is not conferred *tabula rasa;* the state must comply with a two-

pronged test in order to qualify for immunity from the application of federal antitrust law. First, the restraint of trade must be clearly articulated in state law with the purpose to displace competition. Second, the restraint must be subject to "active state supervision" by independent officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* ("*Midcal*"), 445 U.S. 97 (1980); *see also Federal Trade Comm'n v. Ticor Title Insurance Co.*, ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) ("the purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State's own"). There is some question in the instant case whether the restraint at issue is authorized by law, since state law appears to countenance the use of the term "accountant" by those other than CPAs. The Board might argue that it has general authority to regulate and to displace competition, but the extension of legitimate authority to prevent misleading consumers into a cartel protection measure not countenanced by the enabling statute appears to raise some question.

The major question raised by the instant case, however, has to do with the second prong of the state action immunity test: the requirement of active and independent state supervision. This concept rests with a basic notion of unlawful delegation. The state may not delegate to private interests the role of guardian over a restraint of trade which benefits them, even if it wants to do so. In the leading case of *Midcal*, the Supreme Court held that the system of vertical price fixing clearly authorized by California law failed this second prong. There, the state

allowed liquor distillers to set resale prices and, although a state agency was purportedly required to review the proposed prices on behalf of the general public, it routinely rubber-stamped the prices submitted by the distillers without exercising *bona fide* independent supervision. The facts before the Court here would appear to be *a fortiori*; the parties who have adopted the anticompetitive regulation and who are interested in maintaining it are actually the state overseers. It would hardly have cured the *Midcal* defect for the state to create a board of eight liquor distillers and turn over to them the task of doing the rubber-stamping.

The rationale behind the "independent" element of the "independent state supervision" prong is here sorely tested. The purpose of the requirement appears to be an assurance that if the Supremacy Clause is to be laid aside and a state's restraint allowed to carve out an exception to the law of the land governing competition, the state must intend to regulate, and the state must do so independent from the economic interests benefiting from the restraint. "State action immunity" from federal antitrust application is not a *pro forma* blank check. States may not delegate to private parties that supervision, either by creating an agency which routinely defers to them, or by – arguably even worse – designating a cartel as an "agency" and declaring its supervision to be "independent."

CONCLUSION

The Board contends that the use of the term "accountant" or "accounting" by nonlicensees is deceptive and misleading; however, it is the *Board's* restriction of the use of that term which is shamefully misleading. Under the Board's Rule 2, only Board licensees are "accountants" and may legally advertise "accounting" services. The CPA-controlled Board ignores the fact that the legislature has reserved a wide range of accounting services for non-CPA accountants, and has *not* precluded non-CPAs from using the terms "accountant" or "accounting." The Board's message to the public – that only Board-licensed CPAs are "accountants" – is legally erroneous, factually inaccurate, and a disgraceful display of industry-controlled cartel-like conduct which should never be permitted of a state agency with a mandate to protect the public. The livelihoods of almost one thousand members of the California Association of Independent Accountants and other unaffiliated non-CPA accountants have been curtailed without representation by a state licensing agency dominated by competitors – those with a substantial pecuniary interest in restricting the public's access to these nonlicensees.

Because adoption and enforcement of section 2, Division 1, Title 16 of the California Code of Regulations, has been and is being accomplished by a board which is constitutionally disqualified from so doing, and because the anticompetitive conduct at issue violates the federal antitrust laws and is not exempt therefrom, the Center for Public Interest Law urges this Honorable Court to grant

Petitioners' instant petition for writ of certiorari, invalidate Rule 2, reverse the lower courts' rulings, and vacate the injunction.

Dated: December 24, 1992.

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